

House Committee on Ways and Means

**The Internal Revenue Service's Implementation and Administration of
the Democrat's Health Care Law**

**Testimony of Timothy Stoltzfus Jost
Professor, Washington and Lee University School of Law**

Submitted for myself and not for any organization

1370 Lincolnshire Drive
Harrisonburg, Va. 28802
540 564 2524
jostt@wlu.edu

House Committee on Ways and Means

The Internal Revenue Service's Implementation and Administration of the Democrat's Health Care Law

Testimony of Timothy Stoltzfus Jost

In a little more than a year, millions of uninsured Americans will begin enrolling in health insurance plans through the American Health Benefits Exchanges. These Americans—your constituents—will be able to purchase health insurance because of the availability of premium tax credits. At this point, it appears that many states are choosing not to create their own exchanges in 2014, but rather to have their citizens purchase health insurance through federally facilitated exchanges. It is essential that these uninsured Americans be able to receive premium tax credits through these federal exchanges. My testimony addresses the provisions of the Affordable Care Act that will make it possible for this to happen.

My name is Timothy Stoltzfus Jost and I am a law professor at Washington and Lee University. I am also a consumer representative to the National Association of Insurance Commissioners and an elected member of the Institute of Medicine. I have written extensively about the Affordable Care Act, and blog regularly about Affordable Care Act implementation at www.healthaffairs.org/blog.

My remarks today address assertions by Michael Cannon of the CATO institute that the Department of the Treasury's rule providing for the federal exchange to issue tax credits is not authorized by the Affordable Care Act. This assertion has been widely publicized and seems to be causing confusion among state lawmakers. Mr. Cannon's position, however, is based on a misunderstanding of the law, its structure, and history, as I will explain.

The Affordable Care Act Exchanges and Premium Tax Credits

To understand this issue it is necessary to understand the role of the exchange in the Affordable Care Act. The American Health Benefits Exchange is fundamentally a market in which health insurance is bought and sold. The exchange is also responsible for ensuring that insurers who sell their products through the exchange meet certain minimum standards to ensure that individuals and small employers who purchase in the exchange are getting value for their dollar. Finally, the exchange is the gateway to federal premium tax credits, Medicaid, and other assistance programs for those unable to afford health insurance. The exchange concept has until very recently enjoyed broad bipartisan support as a tool for making private sector health insurance widely available and affordable to Americans. Indeed, Congressman and Vice President nominee Paul Ryan's Roadmap for America includes health insurance exchanges.

Section 1311 of the Affordable Care Act asks the states to establish American Health Benefits Exchanges. The federal government cannot order a state to operate a federal regulatory program, so section 1321 of the ACA authorizes the Secretary of Health and Human Services to establish a federally facilitated exchange in states that choose not to establish their own exchange.

Mr. Cannon takes the position that federal exchanges cannot offer premium tax credits. He bases this opinion on two subsections of section 36B of the Internal Revenue Code (created by section 1401 of the ACA), which provides for tax credits to help middle-income Americans afford health insurance. In defining the premium tax credit amount and the coverage months for which it is available, sections 36B(b)(2) and 36B(c)(2)(A) refer to persons “enrolled in [a qualified health plan] through an Exchange established by the State under section 1311.” Mr. Cannon argues that this language precludes premium tax credits being issued through the exchanges operated in the states by the federal government. If this is true, it is likely that many—perhaps most--Americans will be denied access to an important middle-class tax benefit in 2014, as it now appears that many states will, at least initially, have federally facilitated exchanges.

In a recent article, Mr. Cannon, together with Professor Jonathan Adler of Case Western University, claims that this language is not only unambiguous but also intentional, that Congress intended to punish states that refused to establish exchanges by refusing premium tax credits to their residents.¹ Cannon and Adler further claim that final rules promulgated by the IRS making premium tax credits available through federal as well as state exchanges are unauthorized by law, and thus illegal.

If this claim is true, uninsured constituents of members of this committee stand to lose billions of dollars in federal tax relief that would have assisted them in purchasing health insurance.

The Affordable Care Act Explicitly Authorizes Federal Exchanges to Provide Premium Tax Credits

Fortunately for your constituents, Mr. Cannon’s claims are simply not true. If the sections that he cites were the only relevant sections of the Affordable Care Act, and if the legislative history and structure of the ACA could be simply ignored, his statutory construction claim would be plausible. But the availability of tax credits through federally facilitated exchanges is recognized through the language of the ACA itself. Moreover, the legislative history of the ACA also establishes that Congress understood that premium tax credits would be available through both federal and state exchanges. The IRS is explicitly authorized by Congress to interpret the statute and its interpretation of the law will be given deference by the courts. The existence of exchanges in every state was assumed both by the Congressional Budget Office and by both proponents and opponents of the ACA as it was being debated. Finally, the structure and purpose of the ACA requires that state or federal exchanges offer premium tax credits in every state.

I begin with the language of the ACA itself. The term “exchange” is a defined term under the ACA, a point that Mr. Cannon does not mention in his article but that would surely be paid great attention by the courts. Section 1563(b) of the ACA states: “The term ‘Exchange’ means an American Health Benefit Exchange established under section 1311 of the Patient Protection and Affordable Care Act.” Section 1311 literally requires that the states “shall” establish an American Health Benefits Exchange by January 1, 2014. Because the Constitution prohibits the federal government from literally requiring states to establish exchanges, however, section 1321(c), provides that “the [HHS] Secretary shall (directly or through agreement with a not-for-profit entity) establish and operate *such* Exchange within the State.” Under the ACA’s definition of exchange, the term “Exchange” in section 1321 means a section 1311 exchange. This is reinforced by section 1321 itself, in which the term “such Exchange,” refers to the “required exchange” mentioned in section 1321(c)(1)(B)(i), which is to say the 1311 exchange. When section 1321 directs HHS to establish an “Exchange,” therefore, it means to establish a section 1311 exchange, which section 36B authorizes to provide premium tax credits. Moreover, section 1311(d)(1) defines an exchange as an exchange established by the state, therefore by definition a section 1321 federally facilitated exchange is an exchange established by a state under section 1311.

Section 36B is not the only section of the ACA that imposes duties on the state and federal exchanges relevant to premium tax credits. Section 1311(d)(4)(G) requires exchanges to provide their enrollees with premium calculators that include a deduction for premium tax credits. Section 1311(d)(4)(I), requires exchanges to forward to the IRS information about enrollees who are eligible for premium subsidies. Section 1311(d)(4)(J), requires an exchange to notify employers if their employees are receiving premium tax credits. Finally, section 1413 requires state and federal exchanges to use streamlined applications and eligibility assessments to help people qualify for "health subsidy programs," which programs specifically include premium tax credits, see section 1413(e)(1). All of these sections apply to federal as well as state exchanges.

Most importantly, a third subsection of section 36B itself clarifies that premium tax credits are available through both state and federal exchanges. The ACA is composed of the Senate version of the Patient Protection and Affordable Care Act, Public Law 111-148, and the Health Care and Education Reconciliation Act, Public Law 111-152. The Senate adopted the bill that became Public Law 111-148 in December of 2009, but the House adopted it only in March of 2010. Shortly thereafter, the House and Senate adopted HCERA, through which the House made certain changes in the Senate bill. As a later-adopted statute, HCERA takes precedence over that of the PPACA, if there is a contradiction. Moreover, since the adoption of HCERA was necessary to secure House adoption of the Senate bill, it is doubly important that the provisions of HCERA be taken seriously. The House bill contained only a federal exchange. Section 1004 of HCERA adds to IRC section 36B, subsection 36B(f)(3) which requires both 1311 and 1321 exchanges to provide certain information regarding premium tax credits to the IRS and to taxpayers. Cannon and Adler admit the existence of this provision but simply say it is meaningless, as 1321 exchanges cannot authorize premium tax credits. This position,

however, violates another canon of statutory construction—that every provision of a congressional enactment should be given effect.

It should be noted that several other sections of the ACA use the language on which Mr. Cannon relies--“an Exchange established by the State under section 1311.” One of them is section 2001, which prohibits states from reducing Medicaid eligibility until an exchange “Established by the State under section 1311” is operational.” If Mr. Cannon’s interpretation of the ACA is correct, states that decide not to establish a state exchange will be barred indefinitely from changing their Medicaid eligibility requirements. But this is not what the law means.

The Affordable Care Act’s Legislative History also establishes that Federal Exchanges can offer Premium Tax Credits

Mr. Cannon’s interpretation of the ACA is also refuted by the legislative history of the ACA. The Senate bill which became the ACA was derived from the S 1679,² the Senate Health, Education, Labor and Pensions Committee bill and S 1796³ which emerged later from the Senate Finance Committee. Each of these bills included state and federal exchanges, which were called Gateways in the HELP bill.

The HELP bill (section 142, adding section 3104 of the Public Health Services Act) created an elaborate structure under which states could either establish exchanges themselves (“establishing states”), request the federal government to establish an exchange in the states (“participating states”), or fail to do either, in which case four years after the enactment of the statute the federal government would create a fallback exchange in the state. Premium tax credits were available in establishing and participating states, but would only be available through the federal fallback exchanges in states that complied with the employer responsibility provisions for state and local employees. In other words, the states were threatened with loss of premium tax credits, not for failing to establish exchanges but for not complying with the employer responsibility provisions for their employees.

The Finance Committee bill did not use this elaborate structure. In fact, the rules it creates are very similar to the final ACA. It creates section 2235 of the Social Security Act, which provides that states “shall” establish an exchange, and sets out the duties of the exchange. Section 2225(b) provides, in language very similar to current ACA section 1321, that HHS shall contract with a nongovernmental entity to operate an exchange in states that fail to “establish and operate” an exchange in states that fail to create one within 24 months. The Finance Committee Report⁴ refers to these federally established exchanges as “state exchanges.” In a number of places, including the precursor of the current premium tax credit provision, the bill refers to exchanges “established by the state,” but nowhere does it provide, as did the HELP bill, that premium tax credits would not be available in the any of the exchanges created by the federal government.

The provisions of the current ACA addressing this issue are taken largely from the Finance Committee bill, which makes sense because the Finance Committee has jurisdiction over tax matters. The punitive provisions of the HELP bill were abandoned.

The Senate debated the ACA extensively during November and December 2009. The version of the Act they were considering included both state and federal Exchanges. Throughout the debate, Senators assumed that tax credits would be available in all 50 states. Thus Senator Bingaman stated on December 4, 2009, that the ACA “includes creation of a new health insurance exchange in each State which will provide Americans a centralized source of meaningful private insurance as well as refundable premium tax credits to ensure that coverage is affordable.”⁵ Senator Johnson stated on December 17, “the legislation will also form health insurance exchanges in every State,” which will “provide tax credits to significantly reduce the cost of purchasing that [insurance] coverage.”⁶

If Congress had meant to limit premium subsidies to state-established exchanges, as an incentive to States, one would have expected the Finance Committee report on S. 1796 to have mentioned this, and for at least one Senator to have pointed this out during the debate in November and December 2009.

Most importantly, the Congressional Budget Office (together with the Joint Committee on Taxation) provided Congress on November 30, 2009, with an analysis of the impact of the legislation on premiums that assumed that premium tax credits would be available in all states, making no distinction between federal and state exchanges.⁷ Over the next few days this analysis was discussed by Republican Senators Grassley,⁸ Enzi,⁹ and Coburn.¹⁰ None raised what Cannon and Adler see as an obvious point—that the CBO analysis was flawed because it failed to recognize that premium tax credits would not be available through federally facilitated (sec. 1321) exchanges. In fact, the CBO repeatedly provided cost estimates of the ACA and HCERA in late 2009 and early 2010, but never suggested that premium tax credits might be reduced if states failed to establish exchanges. In their most recent report from two weeks ago updating ACA coverage estimates in the wake of the Supreme Court decision, the CBO and JCT reiterates again that premium tax credits will be available through state, federal, and partnership exchanges.¹¹ As Yale Professor Abbe Gluck notes in a recent blogpost¹² (and forthcoming article), Senators often don’t listen to each other, but they all listen to the CBO, which assumed that premium tax credits would be available to all Americans in all states.

Mr. Cannon claims, however, to have found a smoking gun, a colloquy between Senators Baucus and Ensign during the Finance Committee debate on the bill, in which, they claim, Senator Baucus admits that premium tax credits could not be made available through federal exchanges. In fact, the colloquy had nothing to do with federally facilitated exchanges, but rather with whether the Finance Committee or the Judiciary Committee had jurisdiction over malpractice reform legislation that Ensign wanted to attach to the bill. In fact, there is nothing in the legislative history of the ACA that

supports the notion that premium tax credits will not be available through federal exchanges.

Mr. Cannon argues that Congress prohibited the federal exchanges from offering premium tax credits as a way of encouraging the states to adopt exchanges. It is in fact clear that Congress favored state exchanges, and offered generous grants to the states—which to date have totaled nearly \$850 million dollars with more on the way.¹³ States that fail to establish exchanges will also lose some control of their insurance markets. But Congress did not try to “coerce” states to create state exchanges by threatening their citizens with loss of billions of dollars of premium tax credits. Indeed, under the Supreme Court’s recent Medicaid decision, such coercion might have been suspect.

The Structure of the Affordable Care Act Makes it Clear that Federal Exchanges may offer Premium Tax Credits

Moreover, not only do a number of provisions of the ACA, already described, refer explicitly to federal and state exchanges performing functions relating to premium tax credits, but the entire structure of the ACA’s insurance reforms are based on the availability of premium tax credits in all states. The ACA’s guaranteed issue and community rating requirements apply to insurers in all states, regardless of whether they have federal or state exchanges. So do the ACA’s risk mitigation programs. So does the ACA’s individual mandate. The premium tax credits are intended to bring millions of new participants into insurance markets, and if they are not available in many states, the nature of insurance markets will change dramatically, increasing the risk of insurers and decreasing availability to middle-income Americans. If this was the intent of Congress, it surely would have made it far more evident.

The ACA is admittedly not a model of clear drafting. It contains three sections with the same number (1563) and amends an existing provision of the Public Health Services Act inconsistently twice within the scope of a few pages. The Senate bill was not supposed to be the final law. Only Senate the election in Massachusetts in early 2010 made a conference committee bill that would have reconciled the House and Senate versions and cleaned up the current bill impossible. The courts are unlikely to find the “established by the state” language a “scrivener’s error.” But the courts will interpret the ambiguous language in the context of the ACA’s structure and purpose, in light of the ACA’s legislative history, and putting great weight on the HCERA amendment, and find that federally facilitated exchanges can in fact issue premium tax credits.

The Department of the Treasury is Authorized to Interpret Section 36B and the Courts will Defer to its Interpretation

Finally, the courts are likely to grant great deference to the IRS premium tax credit regulation. Section 36B explicitly grants authority to the IRS to interpret the section. A recent CRS Legal Analysis of this issue states clearly that under the ruling “Chevron doctrine,” derived from the case of *Chevron v. NRDC*,¹⁴ courts will defer to the

interpretation of the IRS of section 36B unless they conclude that “Congress has spoken to the precise question at issue.” As should by now be amply clear, Congress has not clearly said that federal exchanges cannot grant premium tax credits. If a court finds the issue ambiguous, however, “the question for the court is whether the agency's answer is based on a permissible construction of the statute.” In this situation, “legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.” As noted above, the interpretation of the ACA by the IRS is completely consistent with rather than “manifestly contrary” to the statute, and thus will be granted judicial deference.

Conclusion

In 2014, millions of your constituents will gain access to private health insurance coverage with assistance with premium tax credits. It was the hope of Congress and remains the hope of the federal agencies implementing the ACA that they will receive these premium tax credits through state exchanges. But the ACA also created fallback federal exchanges, which will be available in states represented by other members of this Committee to ensure that all Americans get access to affordable health insurance. The Department of the Treasury has correctly determined based on the language and history of the ACA that premium tax credits will be available through all exchanges, state and federally facilitated. None of your constituents will be denied the tax credits made available through the ACA to ensure them access to affordable health insurance. I thank you for the opportunity to address this important issue.

References

- ¹ Jonathan Adler and Michael Cannon, Taxation without Representation: The Illegal IRS Rule to Expand Tax Credits Under the PPACA (2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2106789
- ² S 1679, <http://www.govtrack.us/congress/bills/111/s1679/text>
- ³ S 1796, <http://thomas.loc.gov/cgi-bin/query/z?c111:S.1796/>
- ⁴ Senate Report 111-89
- ⁵ 155 Cong. Rec. S12358.
- ⁶ 155 Cong. Rec. S13375.
- ⁷ CBO, An Analysis of Health Insurance Premiums Under the Affordable Care Act, <http://www.cbo.gov/publication/41792>
- ⁸ 155 Cong. Rec. S12107, 12/2/09
- ⁹ 155 Cong. Rec. S12378, 12/4/09
- ¹⁰ 155 Cong. Rec. S13687
- ¹¹ <http://www.cbo.gov/sites/default/files/cbofiles/attachments/43472-07-24-2012-CoverageEstimates.pdf> at n. 14.
- ¹² <http://balkin.blogspot.com/2012/07/cbo-canon-and-debate-over-tax-credits.html>,
- ¹³ <http://statehealthfacts.kff.org/comparetable.jsp?ind=954&cat=17>
- ¹⁴ 467 U.S. 837 (1984).